

ROBERT LIMBERT

OTIS SCHOOLCRAFT

IBLA 86-1601

Decided September 6, 1988

Appeal from a decision of the Idaho State Office, Bureau of Land Management, rejecting an application to open lands to mineral entry pursuant to the Act of April 23, 1932, 43 U.S.C. | 154 (1982). I-20938.

Affirmed.

1. Act of April 23, 1932--Mining Claims: Lands Subject to--Mining Claims: Special Acts--Mining Claims: Withdrawn Lands--Reclamation Lands: Generally--Withdrawals and Reservations: Reclamation Withdrawals--Withdrawals and Reservations: Revocation and Restoration

In almost every case an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. | 154 (1982), will be rejected by the Bureau of Land Management when the Bureau of Reclamation recommends against restoration. If the record on appeal contains cogent reasons for the Bureau of Reclamation rejection and states a logical basis for a finding that, for the lands in question, the interests of the United States could not be protected by the imposition of limitations provided by the Act and other laws applicable to mining operations, the determination will be affirmed by this Board.

IBLA 86-1601

104 IBLA 154

2. Act of April 23, 1932--Mining Claims: Lands Subject to--Mining Claims: Special Acts--Mining Claims: Withdrawn Lands--Reclamation Lands: Generally--Withdrawals and Reservations: Reclamation Withdrawals--Withdrawals and Reservations: Revocation and Restoration

The Act of Apr. 23, 1932, 43 U.S.C. | 154 (1982), gives the Secretary of the Interior authority to open lands subject to a reclamation withdrawal to mineral entry

if the lands are known or believed to be valuable for minerals. It is neither necessary nor desirable to require a determination whether the lands are known to contain valuable minerals sufficient to support a "discovery" prior to opening the lands. All that need be determined is whether it may reasonably be believed that the lands contain valuable minerals.

3. Act of April 23, 1932--Mining Claims: Lands Subject to--Mining Claims: Special Acts--Mining Claims: Withdrawn Lands--Reclamation Lands: Generally--Withdrawals and Reservations: Reclamation Withdrawals--Withdrawals and Reservations: Revocation and Restoration

When the Bureau of Land Management has conducted a mineral examination to determine whether the lands are known or believed to be valuable for minerals and, based upon that examination, has concluded that the lands are not known or believed to be valuable for minerals, an appellant must prove by a preponderance of the evidence that the Bureau

of Land Management determination is incorrect.

APPEARANCES: Robert Limbert, pro se, and on behalf of Otis Schoolcraft, partner.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Robert Limbert and Otis Schoolcraft have appealed from a decision of the Idaho State Office, Bureau of Land Management (BLM), dated July 30, 1986, rejecting their application to open lot 8, sec. 4, T. 4 N., R. 7 E., Boise Meridian, Idaho, to mineral ~~lot~~ ⁴⁰⁴. These lands are a part of the

Payette Boise Reclamation Project, and subject to a first-form withdrawal dated October 7, 1904.

The application was originally filed on June 22, 1984, under the Act of April 23, 1932, 43 U.S.C. | 154 (1982). In 1984 the Bureau of Reclamation (BOR) submitted a memorandum to BLM recommending that the lands not be opened to entry, and BLM rejected the application pursuant to 43 CFR 3816.3. On appeal of that decision, we reviewed the applicants' proposed plan of operations and the BOR recommendations. The BLM decision was set aside and the case was remanded to BLM for a determination of whether the land was valuable for minerals and for further consideration of the applicants' proposal by BOR. Robert Limbert, 85 IBLA 131, 133 (1985).

In the Limbert opinion, the Board noted there was no indication whether the lands were considered to contain valuable minerals and directed BLM to examine this question during its further consideration. As a means of making this determination, on October 8, 1985, several BLM and Forest Service geologists conducted a field examination.

During the examination four mineral samples were taken on the site. All four samples were processed and concentrated with the "Denver Gold Saver" and were assayed for free gold by amalgamation. In the mineral report of the field examination, the examiners concluded that the tract could not support a mining operation. The report specifically stated:

[A] mining operation would lose \$3.49 per cubic yard or a total of \$29,665, if the entire deposit were mined from Bench #2. Both an

analysis of the early mining activity and our sampling program indicate that there is a low probability that a profitable operation can be sustained on Lot 8.

(Mineral Report at 7).

BLM transmitted the mineral report to BOR for its further consideration and recommendations. By memorandum dated July 10, 1986, BOR responded, recommending that the first-form withdrawal be retained on these lands and that mining operations be prohibited. The reasons for the determination were similar to those outlined in its original June 21, 1985, memorandum. BOR adhered to its earlier recommendations citing its previous bad experiences when withdrawn lands had been opened along critical drainways to project reservoirs, and lack of support for opening the land to mineral entry by other local agencies, stating:

The Bureau of Reclamation has reconsidered opening the tract as directed in the IBLA opinion and has considered the impacts upon the project facilities from the loss of the withdrawal along the river. As we proposed in our April 25, 1985, memorandum to you, we requested comments from other agencies to aid us in determining impacts and mitigative measures that might be required if lands were opened. We sent out 17 letters and as of this date received 10 responses. The replies indicate that opening the withdrawn lands to mineral entry would also have a very significant impact on other agencies' programs in that area. Formal National Environmental Policy Act (NEPA) compliance, probably an environmental impact statement (EIS), appears necessary.

(BOR Memorandum of June 21, 1985, at 2.)

Appellants again object to BLM's refusal to open the land to mineral entry, contending that their estimates indicate the gravel at the site

"runs about 10 to 17 dollars a cubic yard in gold and silver" (Statement of Reasons (SOR) at 1). Appellants assert that BOR has continually ignored their plan of operation and willingness to conduct their operation in a manner which would protect the interests of the United States. They also object to not having been given an opportunity to observe the sampling or participate in the selection of sample sites. Appellants further allege that, accepting the Government's sampling, at \$4.50 a cubic yard they could "still make a good living at \$250 to \$350 a day" (SOR at 6).

[1] Sections 1 and 2 of the Act of April 23, 1932, provide the Secretary of the Interior with discretionary authority to restore land subject to a first-form reclamation withdrawal to mineral entry "when in his opinion the rights of the United States will not be prejudiced thereby" and to take certain other action. 43 U.S.C. | 154 (1982). The statute provides that the Secretary may

[reserve] such ways, rights, and easements over or to such lands as may be prescribed by him and as may be deemed necessary or appropriate * * * and/or the said Secretary may require the execution of a contract by the intending locator or entryman as a condition precedent to the vesting of any rights in him, when in the opinion of the Secretary same may be necessary for the protection of the irrigation interests.

When BOR recommends against restoration of land to mineral entry, BLM is required to reject an application for restoration under 43 CFR 3816.3. 1/ _____
1/ The regulation provides:

"When the application is received in the Bureau of Land Management, if found satisfactory, the duplicate will be transmitted to the Bureau of Reclamation with request for report and recommendation. In case the Bureau of Reclamation makes an adverse report on the application, it will be rejected subject to right of appeal."

As we noted in Robert Limbert, *supra*, there is no such limitation on the Board. However, we will affirm BLM's rejection of an application for restoration when that decision is based on cogent reasons indicating that restoration is contrary to the public interest. *Id.* at 133, and cases cited therein.

In the initial decision of the Board, we directed BOR to reconsider its decision because the record contained nothing that indicated that BOR had considered the restrictions afforded by existing law and imposition of limitations that would protect the interests of the United States. We have adhered to this same course of action in recent cases when we determined the records were not adequate to support the denial of a restoration application. Kenneth Carter, 98 IBLA 100 (1987); John Yule, 96 IBLA 379 (1987).

The BOR recommendation on remand restates its previous objections without addressing the issue of whether the interests of the United States could be protected by limiting mining and related activities on the lands. ^{2/} In many cases, these interests can be protected by a limitation on use set forth in the order opening the lands, by restrictive covenants and bonding requirements contained in a contract to be executed by the party _____

^{2/} On numerous occasions we have rejected arguments similar to those advanced by BOR when presented by individuals and public interest groups. The question raised by an application is whether the lands described in the application can be opened, not whether the opening of the specific lands might lead to further applications, or whether there is a possibility that if this and other future applications are granted an EIS may be required. See Glacier-Two Medicine Alliance, 88 IBLA 133, 146-47 (1985). An EIS is required only if the specific activity has significant environmental impact or if the cumulative impact of the contemplated activity, prior permitted activities, and planned future activities have significant environmental impact. Further, the determination that an EIS is required is made only after considering mitigating measures which may be imposed. See Glacier-Two Medicine Alliance, *supra* at 148, and cases cited.

desiring to conduct mineral exploration, development, or extraction activities on the land, and enforcement of existing state and Federal law. ^{3/} Thus, a determination that the land should not be opened to mineral entry should be based on a site-specific determination, and take into consideration such mitigating measures as may be legally imposed to protect the irrigation interests.

On the other hand, there are sites which are so critical to the operations conducted by BOR that the imposition of necessary restrictions would render any mining operation infeasible. A BOR recommendation that the land not be opened to mineral entry will be affirmed by this Board if it addresses protective measures necessary to carry out the purpose of the withdrawal and makes a reasoned and supportable determination that the lands under consideration cannot be adequately protected or that the necessary protective measures would render a mining operation patently infeasible.

[2] In the previous decision the Board directed BLM to conduct a mineral examination, if needed, and determine whether the lands are valuable for minerals. Robert Limbert, supra at 133. BLM interpreted this statement as a directive to make a determination whether the lands are of such mineral character as to support a discovery. In our prior decision, we were apparently less precise than intended. It was not our intent to require an onsite physical examination sufficient to determine whether a discovery of a valuable mineral deposit existed within the land described in the application. Such examination is both unnecessary under 43 U.S.C. | 154 (1982) _____
^{3/} We note that the State of Idaho has a very strict dredge mining act which would be applicable to appellants' operations.

and inadvisable. Rather, it was our intent to have BLM determine whether the lands were "known or believed to be valuable for minerals."

The importance of this distinction becomes apparent upon examination of the purpose for opening lands for mineral entry and, conversely, the prohibitions placed upon the use of such lands until such time as they are opened to mineral entry. For example, a determination that lands are "believed" to contain valuable minerals could be made by geologic inference. There need not be a physical exposure of mineral in place in sufficient quality and quantity to support a discovery. Thus, if BLM is able to reach a conclusion that the lands are known or believed to be valuable for minerals through geologic inference, the conclusion would support a decision that the lands may be opened to mineral entry, if the other conditions set forth in the Act are met.

On the other hand, if a showing of valuable mineral in place is a prerequisite for a determination that the lands should be opened to mineral entry, a person may be tempted to go on the lands and conduct sufficient prospecting activities to disclose mineral of sufficient quality and quantity to support a discovery prior to filing an application.^{4/} Such a standard would virtually invite trespass on the public land by prospective claimants. Absent a physical exposure of a mineral deposit, they would

^{4/} In addition, if BLM were required to make a mineral examination sufficient to determine the existence of a "discovery" prior to considering opening the lands, the mere fact that the lands were being opened would lead to the conclusion that the lands contained mineral of sufficient quantity and quality to support a discovery. As no rights could accrue until after the land was opened, a land rush would ensue. As can be seen from reading Scott Burnham, 100 IBLA 94, 94 I.D. 429 (1987), this result is best avoided.

otherwise be unable to show that the land was, in fact, valuable for minerals, even though there was a strong basis for a reasonable belief that

the land was valuable for minerals. All such pre-location activities would, of course, proceed without any of the restrictions and reservations which might be made a part of the restoration order. Moreover, such an approach might have the anomalous effect of rewarding those who proceed in trespass while penalizing those who comport themselves with the dictates of the law.

[3] As noted above, the mineral examination conducted by BLM need only disclose sufficient mineral to support a finding that the lands are "believed to be valuable for minerals." See Surprise Ventures Associates, 7 IBLA 44 (1972). In the case before us, BLM conducted a more extensive mineral examination than was necessary for its determination. However, the fact that the examination was more extensive than necessary does not, of itself, invalidate the results, and the arguments on appeal are not sufficient to cause us to overturn the BLM decision based on that examination. Appellants' allegation that the lands are known or believed to be mineral in character must be supported by sufficient evidence to overcome the actual findings in the field, and the evidence submitted by appellants is not sufficient to overcome those findings.

Appellants freely admit they had prospected the land prior to submitting their application. See Statement of Reasons at 5. Yet nothing has been submitted to support the allegation that the land is believed to be mineral in character. For example, appellants assert that they took samples in 1983 which ran "as high as 45 dollars a yard," but have submitted nothing in support of that assertion. Likewise, appellants state that, based on the

BLM assay results, they would be able to conduct operations making \$250 to \$350 a day. There is nothing in the record to show how this would be done or that this amount could be earned in an operation of the nature proposed by appellants, taking into consideration the extra cost resulting from taking those additional measures necessary to protect the public interest. The volume of minable material calculated by the mineral examiners is not contested by appellants, and this factor would have a direct bearing on the profitability of any proposed mining operation. Appellants have failed to establish by a preponderance of the evidence that the BLM determination was incorrect.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

James L. Burski
Administrative Judge